JD–03–18
Pittsburgh, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UPMC AND ITS SUBSIDIARY, UPMC PRESBYTERIAN SHADYSIDE, SINGLE EMPLOYER, D/B/A UPMC PRESBYTERIAN HOSPITAL AND D/B/A UPMC SHADYSIDE HOSPITAL

and

Cases 06–CA–171117
06–CA–171123

SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC

UPMC AND ITS SUBSIDIARY UPMC CHILDREN'S HOSPITAL, A SINGLE EMPLOYER

and

06–CA–171126

SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC

UPMC AND UPMC MERCY HOSPITAL, A SINGLE EMPLOYER D/B/A MERCY HOSPITAL

and

06–CA–171621

SEIU HEALTHCARE PENNSYLVANIA, CTW CLC

Julie Polakoski-Rennie, Esq. and
Zachary Hebert, Esq. for the General Counsel.
Claudia Davidson, Esq. for the Charging Party.
Ruthie Goodboe, Esq. for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on April 13, June 15, 16, and July 21, 2017. The SEIU Healthcare Pennsylvania, CTW, CLC (the Charging Party or Union) filed charges on March 4, 2016 (and amended charges

on March 16, 2016) in Cases 06–CA–171117, 06–CA–171123, and 06–CA–171126;[1] and a charge on March 14, 2016 (and an amended charge on March 21, 2016), in Case 06–CA–171621. The General Counsel issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (herein Complaint) on January 30, 2017, and an Amendment to Complaint on March 24, 2017.

The Complaint and Amendment to Complaint allege that the Respondents violated Section 8(a)(1) of the Act. The General Counsel specifically alleges that Respondent, at UPMC Children's Hospital in about October 2015, threatened employees with unspecified reprisals if they engaged in union activities; on or about December 16, 2015, threatened employees with unspecified reprisals and to retaliate against them for engaging in union activities; and on or about December 16, 2015, created the impression that it was engaging in surveillance of employees' union activities. The Complaint further alleges that Respondent violated Section 8(a)(1) of the Act by oral announcement, promulgating and maintaining a rule prohibiting employees from distributing non-work materials in non-work areas; and by publication on its Infonet, unlawfully maintaining and enforcing a solicitation policy by prohibiting staff members from soliciting or being solicited while off duty. Finally, the Complaint alleges that Respondent UPMC, its subsidiary, Respondent UPMC Presbyterian Shadyside (Respondent Presbyterian Shadyside), its subsidiary Respondent UPMC Children's Hospital (Respondent Children's), and Respondent UPMC Mercy Hospital (Respondent Mercy) constitute a single-integrated business enterprise and a single employer within the meaning of the Act. In its answer, the Respondent denies that it violated the Act as alleged and it denies that the Respondents constitute a single employer.

The Complaint and Amendment to Complaint do not allege that Respondent UPMC independently committed violations of the Act.

The Procedural Issue of the Prehearing Motion to Bifurcate the Single Employer Allegations from the Unfair Labor Practice Allegations

Respondent UPMC filed a prehearing motion to bifurcate the hearing in these matters on April 4, 2017, requesting that document production and the hearing concerning the unfair labor practice charges proceed first, and that the single employer allegations, document production, and litigation concerning the single employer issues occur at a later compliance phase, should those issues become necessary to litigate. The Respondent also timely petitioned to revoke the following subpoenas duces tecum issued and served by the General Counsel on March 24, 2017, to the Custodians of Record for Respondent UPMC, Respondent Presbyterian Shadyside, Respondent Children's, and Respondent Mercy: B-1-VXK26T (Presbyterian); B-1-VXN59Z (Mercy); B-1-VVOF2H (Children's). The Respondents also filed a timely joint petition to revoke the subpoena ad testificandum issued by the General Counsel to Andrea Clark-Smith, Esq., Respondent UPMC's in-house counsel. (A-1-VXNNGF).

[1] In addition, the Charging Party filed a second amended charge in Case 06–CA–171123 on April 4, 2016.

A. Background

This procedural issue raised by Respondent UPMC is not one of first impression for these parties. The same bifurcation issue arose in *UPMC and its Subsidiary, UPMC Presbyterian Shadyside, Single Employer, d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital,* Case Nos. 06–CA–102465 et al., 2014 WL 6808989 (NLRB Div. Judges Nov. 14, 2014) (Carissimi, ALJ), a case involving allegations of numerous unfair labor practices and an allegation that Respondent UPMC and Respondent Presbyterian constitute a single employer. In that case, the parties agreed, with the judge's approval, to first litigate the substantive unfair labor practice allegations in the complaint against Respondent Presbyterian and then litigate the issue of whether Respondent UPMC and Respondent Presbyterian constituted a single employer. 2014 WL 680989 at p. 2. That trial thus commenced with the litigation of the unfair labor practice allegations, with the judge deferring ruling on the Respondents' petitions to revoke the General Counsel's and Union's subpoena duce tecum relating solely to the single employer issue. Id. As the trial regarding those unfair labor practice allegations progressed, Judge Carissimi addressed the issues raised by the petitions to revoke subpoenas so the parties could prepare to litigate the single employer phase of the proceeding. On February 24, 2014, Judge Carissimi denied, in substantial part, the petitions to revoke. Thereafter, he ordered both Respondents to produce the documents pursuant to the subpoenas. The Respondents then indicated they would not comply with the order and, on March 20, 2014, on behalf of the Board, the General Counsel filed an application for enforcement of the subpoenas in the United States District Court of the Western District of Pennsylvania. Id.

In that case, the Judge Carissimi issued an order severing the single employer allegations from the unfair labor practice allegations in the complaint. In doing so, the judge determined that it was appropriate to first issue a decision regarding the unfair labor practices committed by Respondent Presbyterian and later to issue a supplemental decision pertaining to the issue of whether the Respondents constituted a single employer. The judge reasoned that in light of the ongoing subpoena enforcement proceeding in district court, there was uncertainty as to when the single employer allegations would proceed to trial, and it would avoid delaying disposition of the substantive complaint allegations while awaiting the outcome of the protracted subpoena enforcement litigation involving the single-employer issue. Id. at pp. 2–3. Judge Carissimi's November 14, 2014 decision is pending at the Board on exceptions.[2]

B. Respondent UPMC's Motion to Bifurcate and the General Counsel's and Union's Oppositions

In Respondent UPMC's motion to bifurcate the single employer issues in the instant case, it notes that it filed petitions to revoke the General Counsel's subpoenas, in particular those requests for documents pertaining to the single-employer issue, and it indicated that it would continue to challenge any orders which would require it to comply with those subpoenas. The Respondent asserted that litigation of the single employer subpoena issues would likely carry on far beyond the hearing date set for this matter, and that document production and hearing time

[2] The Board has not yet ruled on Judge Carissimi's decision dated November 14, 2014, and as such it has no binding precedential value.

regarding the single employer issue would "completely subsume the underlying unfair labor practice allegations, which are relatively straightforward." (GC Exh. 1(x) at p.5). The Respondent further argued that if my determination on the unfair labor practice issues was that no unfair labor practices were committed, and the complaint was dismissed, it would not be necessary to litigate the remedial issues such as the single employer allegations. The Union filed an opposition to the motion on April 5, and the General Counsel filed an opposition on April 6, 2017. (GC Exh. 1(y) and 1(z)).

C. Analysis

Section 102.35(a)(8) of the Board's Rules and Regulations provides that the administrative law judge shall have authority between the time he is designated and transfer of the case to the Board "[t]o dispose of procedural requests, motions, or similar matters ….; and upon motion order proceedings consolidated or severed prior to issuance of administrative law judge decisions." Consistent with that rule, the Board has specifically held that issues involving the severance of cases in proceedings are within the administrative law judge's discretion. *Adair Standish Corporation*, 283 NLRB 668, 669–671 (1987), enfd. 875 F.2d 866 (6th Cir. 1989). The Board has also held that motions seeking to sever and/or bifurcate litigation of particular issues raised by the complaint are likewise matters within the administrative law judge's discretion. See *Asociacion Hospital del Maestro*, *Inc.,* 317 NLRB 485, 490 (1995) (where Board denied respondent's appeal of the judge's denial of its motion to bifurcate the trial and litigate respondent's Section 10(b) statute of limitations defenses before the merits); *Gulfport Stevedoring Assn.*, 15–CA–096939, unpub. Board order issued Sept. 9, 2013 (2013 WL 4782797, 2013 NLRB LEXIS 593) (denying respondent's motion to dismiss without prejudice to renewing its jurisdictional arguments, and any request to bifurcate the hearing, before the administrative law judge). See also *NLRB v. Chapa De Indian Health Program, Inc*., 316 F.3d 995, 1002 (9th Cir. 2003) (noting that the administrative law judge denied the respondent's motion to sever).

The Board has found that one such area where bifurcation/severance is appropriate is on issues of single or joint employer status. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, 653 fn. 4 (2001). In *Beverly Health and Rehabilitation Services*, the Board affirmed the Bifurcating Order issued by the administrative law judge that held the presentation of evidence on the single employer issue may "require several weeks of litigation on a matter involving refinement of remedy rather than the basic question presented…whether unfair labor practices were perpetrated and, if so, remedied at least by normal procedure." Id. In that case, the Board affirmed the judge's determination that the remedial issues "present clearly severable issues which can be resolved in a supplementary hearing and decision after the ULP and normal remedy determinations are made." Id. See also *Le Rendezvous Restaurant*, 323 NLRB 445, fn. 2 and 3 (1997).

Applying these principles to the instant case, in an Order dated April 11, 2017, I found it appropriate to sever the complaint allegations that Respondent UPMC is a single employer with Respondent Mercy, Respondent Children's, and Respondent Presbyterian from the unfair labor practice allegations, and to bifurcate this proceeding. (GC Exh. 1(bb)). In so doing, I found it appropriate to first litigate and issue a decision regarding the unfair labor practices, and later, at a second phase, litigate and issue a supplemental decision regarding the issue of whether the

Respondents constitute a single employer within the meaning of the Act. In reaching that determination, I found that a number of factors warranted bifurcation. In the instant case there are no allegations that Respondent UPMC independently committed any of the alleged unfair labor practices so there appears to be no basis for it to be involved in the determination of whether the other Respondents committed the unfair labor practice violations alleged. The only significance in alleging UPMC as a respondent is the single employer issue.[3] In addition, the Respondent has asserted that the single employer allegation and evidence will take substantial time to litigate. I found merit in that assessment, as the presentation of evidence by the General Counsel, the Union, and the Respondent, including documentary evidence and related testimony on the issues of whether Respondent UPMC is a single employer with the other three entities would likely result in many days of litigation with the introduction of many documents necessary to prove such single employer findings. While the General Counsel asserted that Respondent's assessment was a "gross exaggeration," and instead estimated that the presentation of the General Counsel's case on the single employer issue could be achieved in "a day's time or less," I found that assessment did not include the amount of time the Respondent would take for the presentation of its evidence on the single employer issue, and I found the General Counsel's and Charging Party's arguments in opposition to be unrealistic and unpersuasive. Thus, I found that litigation of the single employer allegations in the complaint and the parties' presentation of evidence would likely take a substantial amount of time.

In my Order, I further noted that the Respondent indicated that it would, like it did in Judge Carissimi's case, dispute any orders requiring it to produce the subpoenaed documents sought on the single employer issue, thus requiring the General Counsel to seek enforcement of the subpoenas in federal court. Such actions would likely further delay the trial and the potential remedy of any possible unfair labor practice violations. On that subject, the Union asserted that the Respondent made certain assumptions with regard to how the General Counsel would proceed after the Respondent refused to comply with a possible order to produce the documents subpoenaed on the single employer issue, thus inferring that the General Counsel could proceed to litigate the single employer issue without the information it subpoenaed and without seeking enforcement in federal court of any orders to produce the documents. I found that argument equally unpersuasive, as it would seem that the General Counsel would need the information it subpoenaed as evidence to support its assertions that the Respondents constitute a single employer within the meaning of the Act. Finally, I noted that should it be determined that no violations of the Act have been committed, it would be unnecessary to litigate remedial issues such as the single employer allegations.

Taking into consideration the length of time that would be required to litigate the single employer issues and balancing that consideration against the need for resolution of the unfair labor practice issues, I found that severing the single employer complaint allegations from the unfair labor practice allegations, and bifurcating the proceeding, was supported by and consistent with extant Board precedent. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, 653 fn. 4 (2001). Accordingly, I granted the Respondent's motion and severed the single

[3] There are no allegations in the Complaint or Amendment to Complaint that Respondent UPMC itself had independently committed any unfair labor practices. Respondent UPMC would only have liability for any unfair labor practices if it is found to be a single employer with the other entities.

employer allegations from the allegations concerning the unfair labor practices, and proceeded with litigation of the unfair labor practices.[4]

Even though a determination regarding the alleged single employer status of UPMC with the named entities is left for a later phase of this proceeding, for the purposes of this initial phase of the proceeding Respondent UPMC Mercy Hospital, Respondent UPMC Children's Hospital, and Respondent UPMC Presbyterian Shadyside will be collectively referred to as "Respondent(s)."

On the entire record,[5] including my observation of the demeanor of the witnesses,[6] and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent (the Respondent filed a "Consolidated Post-Hearing Briefs of Respondents' UPMC Presbyterian Shadyside, Children's Hospital of Pittsburgh of UPMC, and UPMC Mercy Hospital"), I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondents UPMC Mercy Hospital, UPMC Children's Hospital, and UPMC Presbyterian Shadyside Hospital are Pennsylvania nonprofit corporations with offices and places of business in Pittsburgh, Pennsylvania, where they have been engaged in the operation of acute care hospitals providing inpatient and outpatient medical care.

The Respondents, during the 12-month period ending February 29, 2016, each purchased and received at their Pittsburgh, Pennsylvania facilities good valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania, and derived gross revenues in excess of $250,000.[7] I therefore find that Respondents have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[4] I noted that after issuing a decision regarding the unfair labor practice allegations, I would then proceed with litigation of the single employer issues, and I would accordingly address and rule on petitions to revoke the subpoena duces tecm paragraphs that pertained to the single employer issues. At the conclusion of that phase of the trial, I would set forth a schedule for the filing of briefs on that issue and issue an appropriate supplemental decision regarding the single employer allegations in the complaint.

[5] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Br." for the General Counsel's brief; "CP Br." for the Charging Party's brief, and "R. Br." for Respondent's brief.

[6] In making my findings regarding the credible evidence, including the credibility of the witnesses, I considered the testimonial demeanor of such witnesses, the content of the testimony, and the inherent probabilities based on the record as a whole. In addition, I have carefully considered the testimony in contradiction to my factual findings, but I have discredited such testimony.

[7] Although Respondent's UPMC Mercy Hospital, UPMC Children's Hospital, and UPMC Presbyterian Shadyside Hospital did not admit to the legal conclusion, they admitted to the commerce information necessary to establish jurisdiction. (See Revised GC Exh. 1(s), para. 4(c) through 4(h) and Revised GC Exh. 1(u), para. 4(c) through 4(h)).

The Respondent also admitted by stipulation, and I so find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.[8]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Maintenance and Enforcement of its Solicitation and Distribution Policy Prohibiting Employees from Soliciting or Being Solicited in Non-Work Areas While off Duty

1. The maintenance of its Solicitation and Distribution Policy that prohibits employees from soliciting or being solicited in non-work areas while off duty

The Respondent stipulated that since on or about September 15, 2015, and continuing to the present, it has maintained the same Solicitation Policy in the "UPMC Policy and Procedure Manual," at all of its facilities involved in this proceeding, and which is published on the UPMC Infonet. That policy (HS-HR0717) entitled "Solicitation and Distribution" reads as follows:

> I. POLICY
>
> It is the policy throughout UPMC subsidiary hospitals and facilities to limit solicitation and distribution activities to prevent interference with deliveries of patient care, patient recovery, and performance of staff duties and to avoid imposition on any patient or visitor.
>
> Links to policies referenced within this policy can be found in Section V.
>
> II. SCOPE
>
> This policy applies both to the staff members doing the soliciting or distributing of literature and the staff member being solicited or receiving the distribution in Hospital or other facilities located in the United States. Covered activities include, but are not limited to: solicitation for raffles, charity drivers, sale of goods, proposing or procuring membership in any organization, or canvassing. Activities sponsored and approved by UPMC or a business unit's President are permitted, such as United Way campaigns.
>
> III. DEFINITIONS
>
> A. The term "staff member" in this policy includes employees, volunteers, students and contracted workers.
> B. "On duty" means periods during which a staff member is scheduled to work.
> C. "Off duty" means any period during which a staff member is not scheduled to work.
> D. "Working time" means those periods of the workday when a staff member is on duty and is engaged in performing work duties.

[8] The Respondent also stipulated at trial that Jamie Scalise has been a supervisor and agent of UPMC Presbyterian Shadyside, Thomas Hritz has been a supervisor and agent of UPMC Mercy, and Linda Terry has been a supervisor and agent of Children's Hospital, each within the meaning of Section 2(11) and 2(13) of the Act. (GC Exh. 2)

E. "Non-working time" means those periods of the workday when a staff member is on duty but is not expected to be performing work tasks (i.e., meal periods or breaks).[9]

IV. PROCEDURES

A. No staff member shall engage in solicitation of other staff members, patients, and visitors during working time. In order for solicitation to be permitted, both the staff member soliciting and the staff member being solicited must be on non-working time.

B. No staff member may engage in solicitation during working or non-working time in patient care areas, such as patient rooms, operating rooms, patient lounges, areas where patients receive treatment, corridor and sitting rooms adjacent to patient care areas if a patient or family member is present. For other work areas, no staff member may engage in solicitation during working time.

C. No staff member may distribute any form of literature that is not UPMC related business or staff duties at any time in any work, patient care, or treatment areas. Additionally, staff members may not use UPMC electronic messaging systems to engage in solicitation during working time. (see also Policy HS-IS0147) Electronic Mail, Messaging and Texting).

D. Off-duty staff members may not enter or re-enter the interior of their work areas or other work areas within their workplace facility aside from the cafeteria, exercise facility, Human Resources building, for any purpose (including solicitation or distribution) except to visit patients, receive medical treatment, or for other purposes such as are available to the general public.

E. Generally, only professional recognition, employer service pins, and staff member ID badges may be worn in patient care or treatment areas. When a special activity, such as those related to breast cancer awareness and similar medical causes or connected to local sports teams, is approved by the business unit President, or his/her designee, then other insignia may be worn during such special activity.

F. Non-staff members may not solicit, distribute or post materials at any time on UPMC private property without prior authorization from the President of the business unit, or that person's designee.

G. All situations of unauthorized solicitation or distribution must be immediately reported to a supervisor or department director and the Human Resources Department and may subject the staff member to corrective action up to and including discharge.

(Tr. 89–99; 275–278; GC Exh. 3, 4, and 5)

The record establishes an ongoing union organizing drive at the Respondent's facilities during the relevant time period of this case. (Tr. 281) Respondent witness Samuel Anthony Kane, the current Director of Food and Nutrition Services at Presbyterian Shadyside Hospital, testified in support of Respondent's defense regarding its maintenance of the Solicitation Policy.

[9] The Consolidated Complaint contains an inaccurate transcription of the wording for the description of "Non-working time" by the insertion of the word "not" before the phrase "on duty. (GC Exhs. 3, 4, and 5).

(Tr. 202–204) Kane testified that prior to his current position he served as Retail Manager for Presbyterian Shadyside from 2013 to 2016. (Tr. 203) In that position, Kane managed the Presbyterian Shadyside cafeteria and was responsible for the implementation of UPMC policies as they affected the cafeteria. Although he testified that he had no involvement in developing polices applicable to the cafeteria, he in fact implemented policies with regard to operating the cafeteria. (Tr. 253; 256–257)

Kane testified that one such policy he was familiar with was the Solicitation Policy and he attended meetings with managers concerning that policy that were held across the UPMC facilities, and he received training from Human Resources regarding the Solicitation Policy. (Tr. 257–260) Kane also testified that since he started working for UPMC, he was aware of a union organizing drive, and that he, along with other managers, received management training on how to respond to a union organizing drive, part of which included training concerned with the Solicitation Policy. (Tr. 281) In his training on the implementation of the Solicitation Policy, he was instructed on what areas of the facility solicitation was allowed and not allowed, and he recalled learning that solicitation in the cafeteria was permissible for "employees on breaks during work time." (Tr. 260–261) According to Kane, "on break" meant they are working on a shift and they are on a break. (Tr. 266) Regarding off duty employees' rights to solicit, he testified that "[t]hey are not permitted to solicit while off duty." (Tr. 266–267) He testified that the term "solicit" to him "would be asking questions, having conversations, providing literature, looking for people to make donations, offering to sell things, offering to go places, offering to attend events." (Tr. 267)

Kane also testified with regard to a chart that he was provided during his training on the Solicitation Policy. (GC Exh. 6) The Respondent's chart provides that "On Duty Employees" who are on "Non-Working Time" are allowed to solicit in areas not defined as "Patient Care Areas," including "Other Work Area[s]" and "Non-Work Area[s]." It also provides that "Off-Duty Employee[s]" are not allowed to solicit in "Other Work Area[s]" and "Non-Work Area[s]" not defined as "Patient Care Areas." (GC Exh. 6) Kane, however, testified that he did not know whether an employee break room or the cafeteria constituted work areas for employees who did not work in the cafeteria, and he could not identify the areas that were considered "non-work areas." (Tr. 271)

2. The Respondent's enforcement of its Solicitation and Distribution Policy by prohibiting employees from soliciting or being solicited in a non-work area while off duty

Joshua Malloy, a floor tech environmental services employee on the overnight/third shift at Respondent UPMC Mercy Hospital, testified that he was in the Mercy Hospital cafeteria around noon on March 10, 2016, with Union Organizer Amber Stenman, talking to employees, handing out union flyers, and asking employees sign a union petition. (Tr. 118-120; 122–124) The record establishes that the Mercy Hospital cafeteria is typically used by UPMC employees, patients' families, and the public, and at noon that day there were approximately 65–70 people there. (Tr. 127, 133)

Malloy, who was not on duty at the time, testified that he and Stenman asked employees to sign a petition entitled "We're Worth More" that stated: "Hospital Workers are rising up for better jobs, better healthcare and a stronger Pittsburgh" on April 14th by "…joining thousands

across the country to turn low-wage hospital jobs into jobs that can support families." (Tr. 124–125, 132–133; GC Exh. 13) The bottom portion of the document contained a section where employees could sign their name and provide their contact information, and could fill in a response to the following statement: "Yes! I will stand with my coworkers on April 14 because…" (GC Exh. 13) Stenmen testified that she and Malloy spoke to employees in the cafeteria and showed them the petition, and if the employees "agreed with the idea that they were worth more, they signed the bottom part and kept the top," and she and Malloy took the bottom portion of the petition that the employees filled out and signed. (Tr. 132–133)

Malloy and Stenmen also handed employees a document entitled: "Know Your Rights" which outlined employees' rights under the National Labor Relations Act, such as the right to engage in protected concerted activity without management retaliation or unlawful surveillance. (GC Exh. 14) That document stated:

> KNOW YOUR RIGHTS
>
> Hospital workers have the right to organize;
>
> Hospital workers have the right to talk about wages and working conditions while they're at work, anywhere where they usually can engage in non-work conversations;
>
> Hospital workers have the right to share written information about wages and working conditions during the same time and in the same places as they are permitted to share other written non-work information;
>
> Hospital workers have the same rights as other workers to engage in concerted activity, including permissible picketing and protected strikes, provided that they give 10 days' notice of the activity's time;
>
> Hospital workers have the right to not be retaliated against (discharged, disciplined, or any other adverse action) for engaging in protected concerted activity; and
>
> Hospital workers have the right to have their union activities be free from management surveillance.
> (GC Exh. 14)

Malloy and Stenmen testified that they handed out the union flyers for 1 hour, from approximately 12 p.m. to 1 p.m. without incident. (Tr. 125–126) At that time, there were employees wearing their work uniforms and badges eating their lunches, and there were also members of the general public or patients' families. (Tr. 125–126) However, shortly after 1 p.m., Malloy was approached by Respondent's Dietary Supervisor Thomas Hritz who asked Malloy his name and whether he was on duty. Malloy told him his name and stated that he was not on duty and that he worked the third shift. (Tr. 126, 134) Hritz then told Malloy that he could not hand out flyers or have people sign the petition because it violated UPMC's Solicitation Policy. (Tr. 126, 134)

Stenman, who was standing close enough to hear Hritz's conversation with Malloy, testified that she approached Hritz and asked what the problem was and if he was a manager, to which Hritz responded that he was a manager. (Tr. 134–135) According to Stenman, she asked for clarification on what he was saying, and Hritz stated that Malloy could be there talking, but he could not pass anything out. (Tr. 135) Stenman stated that Malloy was in a non-work area on non-work time, and questioned whether that meant he could not pass out or sign up employees on union cards. In response, Hritz stated that Malloy could sign his coworkers up on union cards if he was on duty, but if he was off-duty, "he could only be there talking." (Tr. 135) When Stenman remarked that "it seemed a little odd that these rules weren't written down somewhere," Hritz responded "I don't know what is or isn't policy, I only know what is passed down to me through human resources." (Tr. 135–136) Stenman told him that she believed that if Malloy was "in the cafeteria talking to people about anything else besides the union…nothing would have been said" about it. (Tr. 136) Hritz responded that Malloy could be there talking to people off duty, he could sign his coworkers up on union cards when he was on duty, but he could not distribute materials or solicit when he was off duty. (Tr. 136) Stenman asked Hritz if someone complained to management about the fact that they were handing out materials, and he responded that "somebody saw the activity and reported it." (Tr. 137) At that point, Malloy asked Hritz if he was going to be fired, and Hritz responded that he was not going to be fired and that he could stay and talk to people as long as he wanted, but he could not hand out flyers or have people sign petitions because it violated UPMC's Solicitation Policy. (Tr. 126–127, 137) Malloy responded that they were going to leave, and he and Stenman left the cafeteria. (Tr. 137)

After the noon incident in the UPMC Mercy Hospital cafeteria, Hritz sent an email that day at 1:24 p.m. (to persons whose positions were not identified in the record), the subject of which stated: "Union Solicitation in the Cafeteria." (GC Exh. 6) In that email, Hritz wrote:

> Just a heads up that an off-shift employee was in the cafeteria this afternoon soliciting and distributing union material. I spoke with him and explained the rules for off-shift employees in non-work areas and asked him to stop. I advised him that he is free to talk about the union with other employees, but that he is not allowed to solicit or distribute. Keep your eyes open for others doing the same.
> To know what is allowed, I've attached the solicitation distribution chart to refresh your memories.
> (GC Exh. 6)

As mentioned above, the chart attached to the email provides that "On Duty Employees" who are on "Non-Working Time" are allowed to solicit in areas not defined as "Patient Care Areas," including "Other Work Area[s]" and "Non-Work Area[s]." The chart similarly provides that "Off-Duty Employee[s]" are not allowed to solicit in "Other Work Area[s]" and "Non-Work Area[s]" not defined as "Patient Care Areas." (GC Exh. 6)[10]

The Respondent did not call any witnesses pertaining to the events that occurred at UPMC Mercy Hospital on March 10, 2016. However, in defense of its maintenance and

[10] The parties stipulated at hearing that the chart was attached to Hritz's email (GC Exh. 6). (Tr. 94–96)

enforcement of the Solicitation Policy, the Respondent presented the testimony of Kane, the former Retail Manager and the current Director of Food and Nutrition Services at UPMC Presbyterian Shadyside Hospital's cafeteria. Kane had no duties or responsibilities relating to Mercy Hospital and his testimony concerned only the cafeteria at Presbyterian Shadyside Hospital. He testified about the operations of that cafeteria, such as times the cafeteria was busy, when there were changes in staffing at that hospital, when the employees used the cafeteria for meal breaks, and how long the lines of customers were at the registers for that cafeteria. (Tr. 204–213)

The record establishes that the cafeteria provides food to patrons. Respondent failed to offer any credible evidence establishing that the Mercy Hospital Cafeteria was a patient care area or a "work area" for anyone other than those employed to work in the cafeteria. However, in defense of its justification for the solicitation policy, the Respondent offered Exhibit 11 into the record and Kane's testimony regarding that exhibit. (Tr. 219–230; R. Exh. 11) Kane identified the exhibit as a photograph of "the monitor near the exit" of the Presbyterian Shadyside cafeteria that "tracks patients as they move through their procedure[s]." (Tr. 219) However, he admitted that he did not take the photograph of the alleged monitor, he did not know who took the photograph and he did not see who took the photograph, he did not know when the photograph was taken, he had not seen that photograph prior to his testimony in this case, he did not know if the photograph was of a monitor used elsewhere at Presbyterian Shadyside Hospital or at any other UPMC facility, and he did not know all the information displayed on the monitor in the photograph or what the letters and numbers on the monitor meant or where they originated. (Tr. 219–230)

3. The positions of the parties

The General Counsel and the Union allege that Respondent's maintenance of the Solicitation Policy is unlawful, specifically asserting that the definition for "off duty" and "non-working time," along with the prohibition against solicitation during working time and the requirement that permissible solicitation must be on non-working time, are vague. They also argue that the maintenance and enforcement of the Solicitation Policy is unlawful because it amounts to a sweeping prohibition against employees soliciting anywhere in its facilities, including those places that are open to the public and are non-patient care areas, such as the cafeteria. Finally, they argue that there is no justification for the rule.

The Respondent alleges that its policy and its definitions of "non-working time" and "off-duty" are not vague or ambiguous, and there is a distinction between employees who are on "non-working time" and those who are "off duty." (R. Br. 10) It further alleges that the policy provides that off-duty employees are barred from access and soliciting in the facility, not unlike members of the public, and therefore Malloy was properly banned from soliciting in the cafeteria while off-duty. Furthermore, Respondent argues that there is justification for prohibiting solicitation by off-duty employees in the cafeteria, and that its policy and its enforcement did not violate the Act as alleged.

4. Analysis

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." Section 7, the cornerstone of the Act, provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

The rights under Section 7 have been found to "necessarily encompass[] the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978). This includes employee communications regarding their terms and conditions of employment. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547 1972); *Parexel International, LLC*, 356 NLRB 516, 518 (2011). As mentioned above, under Section 7, employees also have the right to engage in activity for their "mutual aid or protection," which also includes communicating regarding their terms and conditions of employment. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Thus, a core activity protected by Section 7 is the right of employees to discuss, debate, and communicate with each other regarding their workplace terms and conditions of employment. As the United States Supreme Court has recognized, the workplace "is a particularly appropriate place for the distribution of Section 7 material, because it 'is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.'" *Eastex*, supra at 574, quoting *Gale Products*, 142 NLRB 1246 (1963); *Central Hardware*, supra at 542–543.

It has long been recognized, however, that employees' Section 7 rights to communicate with their fellow employees in the workplace is not without limits. The Board is responsible for balancing "the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights of others may place upon employer or employee." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 492, quoting *Republic Aviation Corp., v. NLRB*, 324 U.S. 793, 797–798 (1945). Thus, in analyzing the propriety of employer rules that limit or govern communications among employees in the workplace, the Board balances employees' Section 7 rights and the rights and interests of employers. *Republic Aviation,* supra at 797–798. In *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976), the Court recognized that "the locus of the accommodation [between the legitimate interests of both] may fall at differing points along the spectrum depending on the nature and strength of respective Section 7 rights and private property rights asserted in any given context." (Internal quotes and bracketing omitted).

With regard to employer maintenance of rules, it is well established that an employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d

52 (D.C. Cir. 1999); *Valley Health System LLC d/b/a Spring Valley Hospital Medical Center*, 363 NLRB No. 178 (2016); *T-Mobile USA, Inc*, 363 NLRB No. 171 (2016); *Triple Play Sports Bar*, 361 NLRB 308, 313 (2014); *Hills & Dales General Hospital*, 360 NLRB 611, 615 (2014). In addition, the Board does not require that an employer actually apply a rule for it to be found unlawful. "Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." *Layayette Park Hotel*, supra; see also *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970), enfd. 450 F.2d 942 (5th Cir. 1971) (the mere maintenance of the rule itself inhibits the engagement in otherwise protected organizational activity and is not precluded by the absence of evidence that it was invoked).

The analytical framework for determining whether maintenance of rules violate the Act is set forth in *Lutheran Heritage Village-Livonia*, supra. Under *Lutheran Heritage*, a work rule is unlawful if "the rule *explicitly* restricts activities protected by Section 7." 343 NLRB at 646 (emphasis in the original). If the work rule does not explicitly restrict protected activities, it nonetheless will violate Section 8(a)(1) if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. In the instant case, there is neither evidence nor allegation that the challenged rule was promulgated in response to union activity. There is also no claim that the rules have been discriminatorily applied. Rather, in this case the claim is that the challenged rule is overbroad and vague, as the stated definitions of "non-working time" and "off duty" are confusing and unclear to the reasonable employee, and thus would reasonably tend to chill employees in the exercise of their rights under Section 7 of the Act.

The Respondent's rule, when taking into consideration how it defines "non-work time" and "off-duty" and when the rule is read as a whole, is confusing and quite frankly, conflicting. Section IV D of the rule provides that off-duty employees (also referred to as "staff members") may not enter work areas of the facility for any purpose (specifically including solicitation and distribution) with the exception of or "aside from" the "cafeteria." Thus, Section IV D allows off-duty employees access to the cafeteria for purposes of solicitation and distribution. Section IV A of the rule, however, provides that while employees shall not engage in solicitation during working time, for solicitation to be permitted, both the employee soliciting and the employee being solicited "must be on non-working time." Even though "off-duty" employees are undisputedly not working and are "non-working" while in that status, the Respondent draws a distinction between those employees who are "off-duty" (defined as periods that the employee is not scheduled to work) and "non-working time" (defined as periods of the workday when the employee is on duty but is not expected to be performing work duties, i.e. "meal periods or breaks.") Thus, by specifically providing that the only permissible solicitation must be by employees on "non-working time," the rule excludes solicitation by off-duty employees (who are not working but nevertheless fail to meet Respondent's definition for being on "non-work time"). Therefore, while Section IV D of the rule provides that off-duty employees are permitted to solicit in the cafeteria, Section IV A prohibits those same off-duty employees from soliciting anywhere at the facility, which would include the cafeteria.

The Respondent's rule is thus confusing and conflicting regarding off-duty employee solicitation in the cafeteria. That factor, however, and how that part of the rule would reasonably

be construed, are factors no longer taken into consideration by the Board. In *The Boeing Company*, 365 NLRB No. 154 (2017), the Board recently addressed its analytical framework for determining whether maintenance of rules violate the Act. In that case, the Board overruled the "reasonably construe" standard in prong one of the *Lutheran Heritage* analytical framework. The Board stated that it "will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee 'would reasonably construe' a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future." Id. slip op. at 2. Instead, the Board set forth a new standard under which it determined that:

> [W]hen evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. We emphasize that the Board will conduct this evaluation, consistent with the Board's "duty to strike the proper balance between…asserted business justifications and the invasion of employee rights in light of the Act and its policy," focusing on the perspective of employees, which is consistent with Section 8(a)(1). As the result of this balancing…the Board will delineate three categories of employment policies, rules and handbook provisions:
>
> *Category 1* will include rules that the Board designates as lawful to maintain, either because (1) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule….;
>
> *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications; and
>
> *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.
>
> Id. Slip op. 2-3.

The Board held that the above three categories represent a classification of results from the application of the new test, and they are not part of the test itself. Id. In addition, the Board decided that retroactive application of the new standard is appropriate, and it will therefore apply the new policies and standards to "all pending cases in whatever stage." Id. slip op. at 16; citing *SNE Enterprises*, *Inc.,* 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co*., 121 NLRB 995, 1006–1007 (1958)). The Board's standard articulated in *The Boeing Company* is therefore applicable to the instant case.

a. The nature and extent of the potential impact on NLRA rights by prohibiting off-duty employees from soliciting or distributing materials in non-working areas.

Under the standard articulated in *The Boeing Company* the nature and extent of the potential impact of the Respondent's rule or policy on NLRA Section 7 rights must first be determined. As mentioned above, the record establishes that the Respondent maintains a Solicitation and Distribution Policy that prohibits off-duty employees from soliciting or distributing material in the cafeteria. Unquestionably, the potential impact of such a ban is extensive, as it would prevent and prohibit employees who are off duty and not on working time from engaging in solicitation and distribution regarding the union and its literature in non-working areas, and it would therefore interfere with employees' attempts to engage in union and protected concerted activities. Such a prohibition would certainly strike at the heart of employees' rights under Section 7 of the Act. In fact, its effect and impact would be inimical to one of the most fundamental precepts of the Act – the right to form, join, or assist labor organizations.

The record further establishes that Respondent has enforced that policy by preventing employees from engaging in union solicitation and distribution in the cafeteria while they were on off-duty status and not working. In this connection, the Respondent has not refuted its enforcement of the Solicitation Policy resulting in banning employees who are off duty from soliciting in the cafeteria. It is undisputed that Malloy and Stenman testified that Manager Hritz told them that Malloy was not permitted to solicit in the cafeteria by handing out union flyers and asking employees to sign a union petition while he was off duty. (Tr. 136) In addition, the instructional chart provided to Respondent's management for training on the rule instructs that on-duty and off-duty employees are prohibited from soliciting in nonpatient care areas that are non-work areas. (GC Exh. 6; Tr. 279) Thus, the record establishes that the Respondent's enforcement of the rule has resulted in the denial of, and interference with, employees' union and protected activities.

In *Republic Aviation*, supra, the U.S. Supreme Court upheld the Board's ruling that an employer's policy prohibiting solicitation in the facility at any time "entirely deprived [employees] of their normal right to 'full freedom of association' in the plant on their time, the very time and place uniquely appropriate and almost solely available to them therefor." 324 U.S. at 801 fn. 6 (internal quotation marks omitted). In that case, the Court recognized that "time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property." Id. at 803 fn. 10. Rules prohibiting solicitation "outside of working hours, although on company property," the Court held, is therefore presumptively unlawful absent "special circumstances [that] make the rule necessary in order to maintain production or discipline." Id. at 803–804 fn. 10 (quoting *Peyton Packing Co., Inc.,* 49 NLRB 828, 843–844 (1943)). Thus, the Board has held with U.S. Supreme Court approval, that restrictions on employee solicitation during non-working time, and on distribution during non-working time in non-working areas, are violative of Section 8(a)(1) unless the employer justifies them by a showing of special circumstances which make the rule necessary to maintain production or discipline. *Beth Israel Hospital*, supra at 492–493.

In *St. John's Hospital & School of Nursing*, 222 NLRB 1150 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1977), the Board considered the fact that a hospital's primary function is patient care, and found that the "special characteristics" of hospitals warranted a rule that is different from that which it generally applied to other employers. Thus, the Board, with Supreme Court approval, has given consideration to the fact that a hospital's primary function is patient care, and "that a tranquil atmosphere is essential to the carrying out of that function." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 495 (1978); *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979); *St. John's Hospital & School of Nursing*, *Inc.,* 222 NLRB 1150 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1977). In order to provide that atmosphere, hospitals may have some leeway in restricting the exercise of employees' Section 7 rights and "may be justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted." *Beth Israel Hospital*, supra at 495.

On that basis, it has been established that hospitals may prohibit solicitation in "immediate patient care areas," such as "patients' rooms, operating rooms, and places where patients receive treatment," because in such areas where solicitation might be unsettling to patients who are in need of quiet and peace of mind, the balance between protected activities and patient needs may be struck against the employee's rights. *NLRB v. Baptist Hospital*, 442 U.S. 773, at 780–781 (approving the standard applied by the Board in *St. John's Hospital).* In *Beth Israel Hospital*, supra, the Court reasoned that hospitals may only prohibit solicitation and distribution in those areas because it is necessary to avoid disruption to patient care or disturbance to patients. In that case, it was recognized that the cafeteria functioned as a natural gathering place for employees and was more of an employee-service area than a patient care area, and the hospital failed to present evidence that the proscription of solicitation in the cafeteria (and coffeeshop) was necessary to prevent either disruption of patient care or disturbance of patients. Therefore the employer in that case violated Section 8(a)(1) by maintaining an overly broad rule against solicitation. In addition, in *Baptist Hospital*, supra, the Court further clarified that "immediate patient care areas" do not include cafeterias, gift shops, and lobbies on the first floor of the hospital. Id. at 786. Thus, extant Board law establishes that no solicitation or no distribution rules in a hospital that prohibit solicitation in areas other than immediate patient care areas, violate Section 8(a)(1) of the Act, absent a showing of disruption to patient care.

b. The legitimate justifications associated with the rule.

Initially, I note that the evidence offered by the Respondent does not establish that the cafeterias in its hospitals are "work areas" or "immediate patient care areas." In particular, at UPMC Mercy Hospital, where there was evidence of the Respondent's enforcement of the rule to prohibit an off duty employee from soliciting and distributing in the cafeteria, there was no evidence establishing that the cafeteria was either a work area for employees other than cafeteria workers, or that it was an area where immediate patient care was provided. The evidence offered by Respondent to arguably support its defense of a legitimate justification for the rule in the cafeteria was the admission of Respondent Exhibit 11 into the record and Kane's testimony regarding that exhibit. As mentioned above, Kane testified that the exhibit was a picture of the monitor near the exit of a different hospital – the UPMC Presbyterian Shadyside hospital – and his assertion that it "tracks patients as they move through their procedure[s]." (Tr. 219) That exhibit, however, is entitled to very little, if any weight if it was offered for that proposition. In

that regard, Kane admitted that he did not take the photograph of the alleged monitor, he did not know when the photograph was taken or the identity of the person who took it, he had not seen the photograph prior to his testimony in this case, he did not know if the photograph was of a monitor used elsewhere at the Presbyterian Shadyside Hospital or at any other UPMC facility, and he did not know all the information displayed on the monitor in the photograph or what the letters and numbers on the monitor meant or where they originated. (Tr. 219–230) Kane's admitted lack of knowledge pertaining to the monitor, how it was used, who used it, which hospital that monitor was actually located in, whether the photograph was an authentic and accurate portrayal of the monitor, and most importantly, how exactly that monitor evinced the administration of immediate patient care, entitles it to very little, if any, weight.

I note that even assuming that monitor was used to show the progress and status of patient procedures or surgeries, and even if it was located at the exit of the Presbyterian Shadyside Hospital cafeteria, such facts are insufficient to establish that the cafeteria is a "work area" or that "immediate patient care" was administered in the cafeteria. If anything, such monitors may be used to inform families eating in the cafeteria when their family members' procedures have been completed, which fails to equate its use to the administration of "immediate patient care." In addition, as mentioned above, in *Baptist Hospital*, supra, the U.S. Supreme Court clarified that "immediate patient care areas" do not include cafeterias. 442 U.S. 773, at 786. Thus, the Respondent failed to present any credible evidence that any of the cafeterias at its hospitals involved in this case constitute "work areas" or "immediate patient care areas."

In addition, no evidence was presented establishing that union solicitation or distribution in the cafeterias caused or resulted in any disruption in patient care. In particular, there was no evidence offered to establish that Malloy's soliciting in the Mercy Hospital cafeteria caused a disruption in patient care. As purported justification, the Respondent presented Kane's testimony that Respondent's alleged need for the Solicitation and Distribution Policy was due to the operation of the cafeteria. For example, he testified that the Presbyterian Cafeteria was busy around meal times, especially at lunchtime, that he had complaints that it took too long for employees to get lunch in the cafeteria as their lunchtime was only 30 minutes long, and that patients without dietary restrictions were able to use the cafeteria if they missed a meal. Kane's testimony that he "believe[d]" the cafeteria plays a part of patient care because the cafeteria "feed[s] the caregivers that are taking care of the patients," is not supported by record evidence. In fact, the record is devoid of any credible evidence establishing that feeding caregivers equates to "immediate patient care," or even if it did, that Malloy's protected activity interfered with or disrupted such patient care. The Respondent's assertions in that regard are therefore meritless, and they fail to establish under extant Board law that a ban on solicitation by off-duty employees during non-working time, in non-working areas is necessary or justified. *Beth Israel Hospital*, supra. Accordingly, the Respondent's maintenance and enforcement of the Solicitation and Distribution Policy prohibiting solicitation and distribution by off duty employees during non-working time, in non-working areas, constitutes a violation of Section 8(a)(1) of the Act.

As such, I find that under the Board's new analysis set forth in *The Boeing Company*, supra, the portion of Respondent's Solicitation and Distribution rule discussed above is properly categorized as a *Category 3* rule that is unlawful to maintain because it prohibits or limits

employees' Section 7 protected conduct, and the adverse impact on such rights is not outweighed by the alleged justifications associated with that rule. 365 NLRB No. 154, slip op. at 2–3.

c. The Respondent's assertion that the rule at issue constitutes a lawful "no-access" rule for off-duty employees is without merit, and even assuming that assertion were accurate, its argument that prohibiting off-duty employee access to the cafeterias is lawful because off-duty employees are more analogous to non-employees or the general public, rather than employees, is unpersuasive.

As mentioned above, the Respondent alleges that its Solicitation and Distribution policy is not vague or ambiguous, and that it clearly bans off-duty employee access to its cafeterias, which it alleges is not unlawful and supported by legal precedent. In that connection, the Respondent asserts that its definitions "clearly establish what status an employee holds with regard to being able to solicit under the [Solicitation and Distribution] policy, and defines their rights accordingly." (R. Br. at p. 11) According to the Respondent, the "NLRB has clearly recognized that different rules apply to employees who were not scheduled to work or who were not scheduled to be on an employer's property, and has developed guidelines to address what rights off-duty employees have…," citing *Tri-County Medical Center, Inc.,* 222 NLRB 1089 (1976) as support for that proposition. (R. Br. at p. 11)

The Respondent, relying on the Board's decision in *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973), overruled on other grounds in *Resistance Technology, Inc*., 280 NLRB 1004, 1007 fn. 7 (1986), enfd. 830 F.2d 1188 (D.C. Cir. 1987), asserts that off-duty employees are "more analogous" for purposes of access to "a nonemployee, and [they are] subject to the principles applicable to non-employees." (R. Br. at 13–14) The Respondent further asserts that since the General Counsel did not present evidence that Mercy Hospital "advertised or opened the cafeteria to the general public," or that the public was "invited into the cafeteria to dine," the public does not have access to its cafeteria. (R. Br. p. 14) Simply put, the Respondent reasons that since off-duty employees are allegedly "more nearly analogous to members of the general public with regard to rights to access," and since the general public has allegedly been denied access to the cafeteria, its off-duty employees (such as Malloy) are to be treated like the public and are "not [allowed] to solicit or distribute in the cafeteria." (R. Br. at 13–14) On that basis, the Respondent asserts that it has not violated the Act by maintaining and enforcing its policy.

The Respondent's arguments, however, are not supported by the record. In this connection, the record does not establish that the public has been denied access to the Respondent's facilities or their cafeterias. To the contrary, as Malloy credibly testified, the "general public" and patients' families have access to, and were present at the Mercy Hospital cafeteria. In addition, whether the Respondent "advertised" that the cafeteria was opened to the public, or whether it officially "granted access" to the public for use, is immaterial. The record simply does not establish, as the Respondent alleges, that the public has been prohibited or barred from access to the facilities or their cafeterias. Thus, the Respondent's argument on this point is unpersuasive.

In addition, the record does not support the Respondent's assertion that its policy clearly provides that access to the cafeteria is banned for off-duty employees. Section IV. D. of the Solicitation and Distribution Policy actually provides that while off-duty employees may not

enter work areas of the facility for any purpose, they may enter the cafeteria. Importantly, the Respondent's assertion is also contradicted by the undisputed evidence establishing that when Malloy was confronted by Manager Hritz and identified himself as being "off duty" because he worked third shift, Hirtz did not inform him that the UPMC Solicitation and Distribution Policy prohibited access to the cafeteria for off-duty employees. Instead, Hritz informed him that Malloy could be there talking to people while off duty, but he could not distribute materials or solicit when he was off duty. (Tr. 126, 134–136) In addition, it is important to note that the complaint in this case does not allege that Respondent unlawfully maintained and enforced an unlawful "no access" policy for off-duty employees, but rather that it maintained and enforced an unlawfully overbroad "no solicitation and distribution policy" (Section IV. A.) which prohibits off-duty employees from solicitation in the cafeteria (a non-work area).[11]

However, in addressing the Respondent's arguments, even assuming the policy clearly denied off-duty employees' access to the facility and cafeteria as Respondent alleges it does, the Respondent's arguments lack legal support. It is true that the Section 7 right of employees to organize on their employer's property is fundamentally different from the rights of non-employees, such as union organizers. *Town & Country Supermarkets*, 340 NLRB 1410, 1413 (2004); *Gayfers Department Stores*, 324 NLRB 1246, 1249 (1997). As explained in *Gayfers*:

> The Supreme Court has recognized a "distinction of substance" between the rights of employees who are rightfully on the employer's property pursuant to the employment relationship and nonemployee union organizers, and distinctly different rules of law apply to each. Under *Republic Aviation* [*Corp. v. NLRB*, 324 U.S. 793 (1945)], the standard governing the rights of employees, an employer may not bar the distribution of union literature in nonworking areas of its property during nonworking time unless the employer can justify its rule as necessary to maintain discipline and production. 324 U.S. at 113 [324 NLRB at 1249.]

In *Town & Country Supermarkets*, the Board noted that, in contrast, nonemployees may be treated as trespassers and are entitled to access to the premises only if they have no reasonable nontrespassory means to communicate their message. Citing *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). The Board in *Town & Country Supermarkets* thus recognized that "[t]he critical distinction is that employees are not strangers to the employer's property, but are already rightfully on the employer's property pursuant to their employment relationship, thus implicating the employer's management interests rather than its property interest. 340 NLRB at 1414; citing *Hudgens v. NLRB*, 424 U.S. 507, 521 fn. 10 (1976); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571–573 (1978). The Board therefore concluded that, "under *Republic Aviation*, supra, off-duty employees may engage in protected solicitation and distribution in nonwork areas of the employer's property." Id. at 1414.

The Respondent, ignoring the *Republic Aviation* principles, relies instead on the 40-year-old Board holding in *GTE Lenkurt,* supra, in support of its argument. In *GTE Lenkurt*, the Board found that a rule which prohibited off-duty employees from "enter[ing] the plant or remain[ing]

[11] As mentioned above, Section IV. A. provides that the only permissible solicitation is by employees on "non-working time," and therefore solicitation by off-duty employees is prohibited.

on the premises" was "presumptively valid absent a showing that no adequate alternative means of communication are available." 204 NLRB at 921. In that case, the Board, in so finding, reasoned that off-duty employees were "more nearly analogous" to non-employees than employees with respect to access to an employer's premises. Id.

However, in *Capital Medical Center*, 364 NLRB No. 69, slip op. at 4, fn. 10 (2016), the Board found that its holding in *GTE Lenkurt* has "long since been superseded." In that case, the Board noted that in *Nashville Plastic Products*, 313 NLRB 462, 463 (1993), the Board specifically rejected that reasoning and held that off-duty employees should not be treated like non-employees, such as nonemployee union organizers, for purposes of access. In *Nashville Plastic Products*, the Board observed that in *Tri-County Medical Center* it "narrowly construed" the holding of *GTE Lenkurt* in order to prevent undue interference with the rights of employees under Section 7 of the Act" and established a test for determining whether a no-access rule for off-duty employees is valid.[12]

In light of *Tri-County Medical Center* and *Nashville Plastic Products*, the Board in *Capital Medical Center* determined that *GTE Lenkurt*, the case relied upon by Respondent, is "no longer good law with respect to the validity of an off-duty no-access rule." Id. slip op. at 4. While the Board recognized that reliance on the principle articulated in those cases that the legality of off-duty no-access rules rest on a balancing of the employer's property rights against the impact of the rule on employee Section 7 rights is proper, it reiterated that such a balance is found by application of *Republic Aviation* and its progeny. *Capital Medical Center*, supra, slip op. at 4, fn. 10; See e.g. *Saint John's Health Center*, 357 NLRB 2078, 2081–2082 (2011). Thus, even assuming the Respondent's policy constitutes a no-access rule for off-duty employees, the Respondent's assertion that off-duty employees are "more analogous" for purposes of access to nonemployees, and they are therefore subject to the principles applicable to nonemployees, is without merit or legal support. Accordingly, I find the Respondent's arguments set forth above are misplaced and without merit.

Instead, I find that based on the well-established law discussed above that is grounded in the Supreme Court's landmark decision in *Republic Aviation*, supra, the Respondent's maintenance and enforcement of its Solicitation and Distribution Policy prohibiting solicitation

[12] In *Tri-County Medical*, the Board held that such a rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. I find that such an analysis is neither necessary nor appropriate here as the instant case involves the validity of a no-solicitation rule, not a no-access rule. However, even assuming the *Tri-County* standard was applicable to this case, Respondent's policy is unlawful under the third prong of that standard. Even assuming the policy generally prohibited off-duty access, the Respondent's policy (Section 2) contains an exception, indefinite in scope, under which off-duty access is permitted for "[a]ctivities sponsored and approved by UPMC or a business unit's President … such as United Way campaigns." (GC Exhs. 3, 4, and 5) In *Piedmont Gardens*, 360 NLRB 813, 813–814 (2014), the Board found that such an exception unlawful as it "gives the Respondent 'broad—indeed, unlimited—discretion 'to decide when and why employees may access the facility.'" Citing, *J.W. Marriott Los Angeles at L.A. Live*, 359 NLRB 392, 392, (2012) (quoting *Sodexo America LLC*, 358 NLRB 668, 669 (2012) (finding facially unlawful a rule prohibiting off-duty access except in unspecified circumstances with prior approval of a manager)).

and distribution by off-duty employees during non-working time, in non-working areas, has an extensive adverse impact on the protected Section 7 rights of employees, and that special circumstances or legitimate justifications have not been established which would outweigh the adverse impact the rule has on employees' Section 7 rights. As such, Respondent's maintenance and enforcement of the rule constitutes a violation of Section 8(a)(1) of the Act.

B. Respondent's Oral Announcement, Promulgation, and Maintenance of a Rule Prohibiting Employees from Distributing Non-work Materials in Non-work Areas

1. The Facts

As mentioned above, regarding the distribution of non-work materials at its facilities, UPMC Presbyterian Shadyside Hospital, UPMC Mercy Hospital, and UPMC Children's Hospital maintain a UPMC Solicitation and Distribution Policy that provides that "No staff member may distribute any form of literature that is not UPMC related business or staff duties at any time in any work, patient care, or treatment areas." (GC Exh. 3, 4, 5, IV. C) However, the record establishes Respondent also orally announced, promulgated, and maintained a Distribution Policy that also prohibited employees from distributing non-work materials in non-work areas, and that such policy was enforced at Presbyterian Shadyside Hospital.

The facts regarding this allegation are essentially undisputed. The record establishes that there is an employee break room located on 12 South of Presbyterian Shadyside Hospital, which is also referred to as the "staff lounge." (Tr. 341) The break room contains a counter, sink, refrigerator, microwave, coffee makers, staff employee lockers, places to hang coats, a time clock, and tables and chairs. (Tr. 341) The employee break room is a non-work area and it is not an immediate patient care area. In this regard, the record establishes that the break room is used by the nurses and aides and other employees who work in that unit primarily for lunch breaks, spending any "down time" they may have, and for meetings, which include monthly staff meetings. (Tr. 72–73, 341–342) The break room is not open to or utilized by the public. (Tr. 116, 351)

Lorraine Fabrizi, who is currently retired, at that time held the position of Health Unit Coordinator at UPMC Montefiore Hospital, which is connected to and considered a part of UPMC Presbyterian Shadyside Hospital. (Tr. 69–71) Fabrizi, who was employed from 2003 until September 2015, testified that during her employment she had always seen papers left on the tables in the 12 South employee break room. (Tr. 72–73) Fabrizi testified that it was "past practice" for employees to leave papers on the break room tables, such as Avon books and orders for items such as candy that employees would sell for their children. (Tr. 74) She also testified that papers were left on the break room tables "all the time," and that "there was always something there." (Tr. 74–75) Current UPMC East employee Jamie Hopson, who previously worked as a Patient Care Technician at Presbyterian Shadyside 12 South, also credibly testified that prior to November 2015, she had seen papers left in the 12 South break room by employees who were selling things, such as Avon products and hoagies during football season, for their children. (Tr. 112, 116) In addition, Hopson testified that she left union flyers in the 12 South break room in November 2015. (Tr. 114–115) Fabrizi's and Hopson's testimony that flyers and papers were routinely distributed or left by employees in the break room was also corroborated by Respondent witness Jamie Scalise, the Unit Director for 12 South of Presbyterian Shadyside

Hospital, who acknowledged that items were left by employees in the break room, and that such items included menus and flyers. (Tr. 342–343)

Fabrizi testified that in September 2015, she attended a staff meeting held by Scalise in the 12 South break room. (Tr. 72–73) She testified that approximately 6–7 employees consisting of nurses and aides were present. During that meeting, Scalise took pamphlets and flyers that were on the break room table and threw them in the garbage. (Tr. 72–73) She testified that the pamphlets included a flyer from the Union, an Avon booklet, and other pamphlets concerning items being sold by employees at work, such as candy for school and Girl Scout cookies. (Tr. 73) As Scalise threw the items in the trash, she stated "its solicitation," and that UPMC has a policy that employees are not allowed to solicit. (Tr. 73) Scalise also informed the employees that there would be no more papers or pamphlets of any type put out on the tables in the break room. (Tr. 73, 78)

Scalise, who testified for the Respondent on this issue, admitted to holding a staff meeting to discuss the distribution policy, and that in that meeting, she stated that the union flyer violated that policy.[13] Scalise testified that she holds staff meetings once a month, at three different times. Between the October and December meetings, she was given a union flyer by a "member of the management team." (Tr. 350) She testified that for the December staff meeting, she included on her written "agenda" for that up-coming meeting a discussion concerning the "solicitation and distribution policy." (Tr. 347) The agenda, entitled "Unit 12S Staff Meeting Agenda," dated December 10, indicated that one of the items to be addressed was "posting non-upmc paper." (Tr. 345–346; R. Exh. 4) Scalise admitted that in the December 2015 staff meeting, she discussed the distribution policy, addressed distributing non-UPMC materials, and during that meeting she stated that the union flyer violated the policy. She specifically testified that during the December staff meeting, she told the employees that "they were not allowed to leave or post things in the break room [or] to leave them there if they were not UPMC related." (Tr. 347) Scalise admitted that she specifically mentioned union flyers as one of the documents that was "not UPMC related," and therefore were not permitted to be posted, distributed, or left on the break room tables. (Tr. 347) While Scalise testified that she did not remember if she had thrown anything away during the meeting, she offered no reason for throwing any of the flyers or pamphlets away other than that they allegedly violated the distribution policy.

The record establishes that the break room was routinely cleaned by the housekeeping staff. (Tr. 116, 351) The Respondent did not present any credible evidence that litter from flyers or pamphlets created a hazard or unsafe conditions in the break room, and it offered no business or safety related reasons for prohibiting solicitation and distribution of flyers in the break room where only employees had access and use of that space.

[13] I note that while Fabrizi testified that staff meeting where she addressed the distribution policy occurred in September 2015, Scalise testified that it was in December 2015. (Tr. 71, 343) Although there is some discrepancy in the record as to when the staff meeting took place, the actual date of the meeting is immaterial because there is no dispute about what Scalise said in the meeting. In any event, while I found Fabrizi to be a credible witness, I find that she may have been mistaken as to the month. It is more plausible that the meeting occurred in December 2015 because Hopson credibly testified (as discussed below) that she left a union flyer in the break room in November 2015, which appears to have prompted Scalise to address the issue of distributing non-UPMC materials in the break room by placing the issue on the agenda for her December staff meeting.

Fabrizi testified that during that time period she had seen Nurse Aide Jamie Hopson placing some union pamphlets on the table in the break room, so shortly after that staff meeting when she saw Hopson again, she told Hopson she should not put the pamphlets down in the break room anymore because of the policy and if she did so she was going to get in trouble. (Tr. 74, 78) Hopson testified that she had in fact placed a union flyer in the 12 South break room in November 2015. (Tr. 115) That flyer was a one-page document with a purported heading of an article from the Pittsburgh Post-Gazette dated November 10, 2015, which read "Wage Committee Testimony 'Shocking,' Councilman Says." (Tr. 115, GC Exh. 12) That flyer stated: "Hospital workers shared formal testimony with City for ALL Wage Review Committee and are spreading the truth about hospital jobs," and it included a photograph of Hopson and a quote from her regarding her pay and ability to save money. (GC Exh. 12) When Hopson went into the break room the next day, the union flyer was no longer there. (Tr. 116)

According to Hopson, after Fabrizi advised her not to leave pamphlets in the break room anymore, she initiated a conversation with Scalise in which she asked Scalise how she was violating the Solicitation Policy by putting out union flyers, because she wasn't selling anything or asking for money, which was her understanding of "solicitation." (Tr. 112–114) In response, Scalise told her that she was not allowed to put flyers out, but she was allowed to talk about the Union. (Tr. 112) Although Respondent called Scalise as a witness, she did not provide testimony regarding her conversation with Hopson, and thus Hopson's assertions are uncontradicted.

Fabrizi testified that since the staff meeting with Scalise where she informed the staff that they could not engage in distributing pamphlets or flyers in the break room, she no longer saw any papers on the table in the 12 South break room. (Tr. 74) In addition, Hopson also testified that since her conversation with Scalise she no longer distributed or left any union flyers in the break room. (Tr. 117)

2. Analysis

The undisputed evidence establishes that even though the written Solicitation and Distribution Policy maintained by UPMC Presbyterian Shadyside Hospital, UPMC Mercy Hospital, and UPMC Children's Hospital provides that distribution of non-UPMC related material is prohibited at any "work, patient care, or treatment areas," (GC Exhs. 3, 4, and 5, Section IV. C.) the Respondent orally announced, promulgated, and maintained an unwritten Distribution Policy that prohibited employees from distributing non-work materials in non-work areas. That unwritten policy, however, was not just applicable to Presbyterian Shadyside Hospital, where there is evidence of its enforcement. Instead, the evidence appears to establish that the unwritten policy was applicable at all three of the Respondent Hospitals involved in this case. In fact, the Respondent acknowledged such in its position paper dated May 9, 2016, submitted by Counsel for Respondent to the government during the investigation of this case, stating:

> The policy against posting is not contained within the Solicitation and Distribution Policy. It is a long term, unwritten policy which forbids the posting of anything anywhere on Hospital property by anybody that is not official Hospital business. Posting includes leaving behind materials in either working or

> non-working areas of the Hospitals, as well as affixing anything to bulletin boards, walls, doors, lockers, windows, pillars, and furnishings on or in Hospital property. (GC Exh. 15)"[14]

In addition, Scalise's announcement of the unwritten distribution policy appeared to be consistent with Respondent's instructional chart attached to GC Exhibit 6, which was purportedly provided to supervision in management training, which would include the Respondent Hospitals in this case. (Tr. 279) That instructional chart provided that on-duty and off-duty employees were prohibited from distributing literature in nonpatient areas that are non-work areas during non-work time. (GC Exh. 6)

The Board has long held that an employer may lawfully prohibit employees from distributing literature in work areas in order to prevent a hazard to production that could be created by littering the premises. *Stoddard-Quirk Mfg. Co.,* 138 NLRB 615 (1962). However, in general, rules or policies prohibiting distribution of literature will be deemed unlawful if they restrict distribution on non-working time in non-working areas. *NLRB v. Magnovox Co. of Tennesee*, 415 U.S. 322, 324 (1974). The Board has also held that an employer's right to preclude distribution of literature in working areas does not apply to mixed-use areas. *DHL Express, Inc*., 357 NLRB 1742, 1742 fn. 1 (2011); *Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 456–457 (2003); *Transcon Lines*, 235 NLRB 1163, 1165 (1978), affd. in relevant part 599 F.2d 719 (5th Cir. 1979) (employer failed to meet burden of establishing that distribution in an area used for recreation as well as work, occurred in a work area or during work time). Nor does that principle extend to areas used for activities only incidental to the employer's main function. *Santa Fe Hotel & Casino*, 331 NLRB 723, 723 (2000).

In *MTD Products, Inc.*, 310 NLRB 733 (1993), the Board held that an employer rule prohibiting solicitation or distribution "[o]n Company premises… unless approved by the Company," was, on its face, overly broad and presumptively unlawful because it was not restricted to working time. See *Our Way, Inc*., 268 NLRB 394 (1983). In that case, the Board found that the employer failed to rebut that presumption by communicating or applying the rule in such a way as to convey intent clearly to permit solicitation during breaktime or other periods when employees were not actively working, and that the rule prohibiting "all solicitation and distribution" was overly broad in violation of Section 8(a)(1) of the Act.

These principles have been applied in the health care setting, as it is well established that health care facilities, such as the Respondent Hospitals, are permitted to prohibit distribution in immediate patient care areas, but must show a disruption of health care operations or disturbance of patient care for a blanket no-distribution rule applicable to nonpatient care areas to be lawful under the Act. *Beth Israel Hospital*, 437 U.S. 483, 507 (1978). Thus, as a health care facility, the Respondents must demonstrate a disruption to patient care for the no-distribution rule applicable to nonpatient care areas to be lawful under the Act.

[14] It is well established Board law that respondent position papers submitted to the NLRB are admissible and can be construed as admissions. See *Evergreen America*, 348 NLRB 178, 187–188 (2006); *Smucker*, 341 NLRB 35, 38–40 (2004); *Tarmac America*, 342 NLRB 1049 (2004); *United Scrap Metal*, *Inc.*, 344 NLRB 467, 468 fn. 5 (2005); *Black Entertainment Television*, *Inc.,* 324 NLRB 1161 (1997).

The Respondent prohibited the distribution of materials in the Presbyterian Shadyside Hospital break room, which undisputedly is a nonpatient care and a non-work area. I find such a rule is overly broad and presumptively unlawful. When this rule was invoked, it did not draw a distinction between patient care/work areas and nonpatient care/non-work areas. In fact, the Respondent admitted this Distribution Policy bans the "posting of anything anywhere on Hospital property by anybody that is not official Hospital business." (GC Exh. 15) Moreover, in this case, the Respondent failed to present any evidence establishing a disruption of patient care when employees distribute materials in non-immediate patient care areas (such as in the employees' break room) which would warrant a broad prohibition. As mentioned above, even though the policy was announced and enforced at Presbyterian Shadyside Hospital, the evidence establishes that it was applicable to and maintained by the all of the Respondent Hospitals involved in this case. Accordingly, I find that Respondent UPMC Presbyterian Shadyside, UPMC Mercy, and UPMC Children's Hospitals' oral announcement, maintenance, and enforcement of the overly broad Distribution Policy violated Section 8(a)(1) of the Act.

With regard to this complaint allegation, the Respondent argues that its rule, as announced and promulgated by Scalise, pertains to posting documents and leaving material in the break room, and is simply a "housekeeping rule" which is "separate and distinct from the Solicitation and Distribution Policy." (R. Br. p. 20–23) Incredibly, the Respondent goes so far as to assert that employees placing union flyers on the table in the break room and leaving them there did not "involve distribution, but rather the leaving behind or posting of materials…." (R. Br. p. 22) These assertions, however, are without merit.

Initially, I point out that Respondent's argument is not supported by the record. The placement of union materials on the tables in the break room and posting the material in that room constituted "distribution" of union material. It is undisputed that when Scalise addressed the employees in her staff meeting, she was referring to the placement of material on the table or posted in the break room as "distribution." In this connection, Fabrizi credibly testified that as Scalise picked up the materials on the table, she stated "its solicitation," and told the staff that UPMC had a policy that employees were not allowed to solicit, and she further informed the employees that they were prohibited from placing papers or pamphlets of any type on the tables in the break room. (Tr. 73, 78) Thus, it is clear that Scalise was referring to the policy pertaining to the solicitation and distribution of material in that non-work area, rather than simply a housekeeping rule.

Most importantly, however, the Respondent's assertions that Scalise was not commenting on employees "distributing" materials during non-working time or in non-working areas, but instead was only discussing "the posting of materials or leaving materials behind in the break room," is belied by her testimony on direct examination concerning the staff meeting, where she stated that the agenda reference to "the posting [of] non-UPMC paper was a discussion of the solicitation and distribution policy." (Tr. 347) Critically, the argument that placing and leaving union literature on the tables in the break room did not constitute "distribution" simply because it was left there for other employees to read if they desired, is also unsupported by Board law. In fact, *Page Avjet, Inc.*, 278 NLRB 444, 450 (1986), one of the cases cited by the Respondent in support of its position, concerned an employer's "distribution procedure" that consisted of

"plac[ing] the literature on the tables for the employees to take and read as they desired." Id. at 450.

The Respondent's assertions that this matter involves a "housekeeping rule" and that it did not violate the Act because throwing out the material on the tables was not unlawful, reveals that it mischaracterizes the issue at hand. The complaint does not allege that the act of collecting and throwing away the union literature in the break room violated the Act. Instead, it alleges that the Respondent violated the Act by orally announcing, promulgating, and maintaining a distribution policy that prohibited employees from distributing non-work materials in non-work areas. The Respondent's characterization of this issue as being a "housekeeping" matter is therefore not accurate and it is unsupported by the record.

I further find that Respondent's reliance on the cases cited in support of that argument is misplaced. In that connection, that the Respondent specifically relies on *Page Avjet, Inc*., 278 NLRB 444 (1986) and *North American Refractories, Co*., 331 NLRB 1640 (2000) in support of its assertion that it did not violate the Act. I find, however, that both cases are unpersuasive. In *Page Avjet*, supra, the Board affirmed the Administrative Law Judge's decision wherein one finding was that a supervisor did not violate the Act, when, on one occasion after an employee break ended in the break room, he picked up union literature that was "scattered on the floor and left on the tables." Id. at 450. The judge found that employees did not have the right to "clutter break areas with union literature." Id. Unlike that case however, in the instant case there is no evidence that the union flyers were scattered on the floor or that employees "cluttered" the break room with union literature. In addition, in the instant case, the Respondent informed employees that they could not distribute material in the break room by leaving it on the tables or posting it, while the employer in *Page Avjet* maintained a distribution procedure that allowed employees to place literature on the tables for the employees to take and read if they desired, and the employees had freely distributed literature without incident. Id. Furthermore, as mentioned above, *Page Avjet* involved an issue of whether the employer violated the Act by picking up the literature in the break room, which differs from the instant case that involves whether the Respondent violated the Act by announcing, promulgating, and enforcing a policy that prohibited the distribution of material on non-work time in non-work areas such as the break room in question. Therefore, *Page Avjet* is clearly distinguishable from the instant case.

I further find that Respondent's reliance on *North American Refractories, Co*., 331 NLRB 1640 (2000) is misplaced. In *North American Refractories*, an employer, during a union organizing drive, confiscated and removed union literature from the employee lunchroom to enforce its housekeeping rules, and the Administrative Law Judge found no violation of the Act with regard to that allegation, and dismissed it. In that case, however, no exceptions were taken to the judge's recommended dismissal of that allegation of disparate enforcement of the housekeeping and distribution rules. *North American Refractories*, 331 NLRB 1640 fn. 1. Therefore, that issue was never before the Board, and the judge's findings with regard to that allegation have no precedential value.[15]

[15] In addition, even if exceptions had been taken to the allegations at issue, I note that the facts of *North American Refractories* are distinguishable from the instant case. Unlike the case at hand, in that case the evidence showed that employees were often reminded of the employer's emphasis on cleanliness in work and non-work areas and the company's expectation that workers and supervisors would pick up

C. The Respondent UPMC Children's Hospital's alleged unlawful threats and creation of the impression of surveillance of employees' union and protected activities, in violation of Section 8(a)(1) of the Act

1. The alleged unlawful statement or threat in October 2015 by Supervisor Linda Terry.

Pamela Banks, a Lead Medical Assistant employed by Respondent UPMC Children's Hospital on the third floor of the Ambulatory Department, worked full-time from 7 a.m. to 4:30 p.m. on the day shift. (Tr. 31) In October 2015, a photograph of her was placed on a union flyer because she was in attendance at one of the union meetings.

Banks testified that on a day in October 2015, at some time during her afternoon work shift on the third floor of the facility, she had a conversation with Linda Terry, the Children's Hospital Supervisor of Outpatient Registration. (Tr. 32–33) Terry did not supervise Banks, but Terry did have an employee who worked as a receptionist in Banks' department, so she did have some occasion to speak to Terry. (Tr. 61, 156). According to Banks, Terry approached her in the hallway and told her that she saw Banks' face "on the front of a union paper around the hospital," and that Banks "should be careful about leaving [her] union flyers laying around the hospital." (Tr. 32–34, 153) Banks responded that she was allowed to attend union meetings if she wanted. Banks testified that no one else was present when Terry made that statement to her about the union flyer, and that she responded by telling Terry she had the right to attend union meetings because the flyer Terry was referring to contained a picture of Banks at a union meeting. (Tr. 62)[16]

Terry, who testified on the Respondent's behalf in this proceeding, denied having this conversation with Banks. In fact, Terry denied having any conversation with Banks regarding her photograph being on a union flyer. (Tr. 169)

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after themselves in the lunchroom, and the union campaign resulted in leaflets being left on tables, counters, microwaves, refrigerators, and on the floor resulting in complaints by other employees concerning "frequent disarray in the lunch and locker rooms, contrary to normal appearance." Id. at 1641. No such facts exist in the instant case. In addition, while in the instant case the employees were informed that distributing material, including union flyers, constituted a violation of the Solicitation and Distribution Policy, the company officials in *North American Refractories* had expressly informed inquiring employees that they were free to distribute prounion flyers in the lunchroom during breaks, and the employer did not interfere when the employees did so. Id. at 1642–1643. In addition, and most importantly, unlike the instant case where the issue is whether the Respondent unlawfully announced and promulgated a distribution policy banning the distribution of literature on non-work time in non-work places, the issue in *North American Refractories* was whether the employer's gathering up the literature violated the Act. Id. at 1643.

[16] Terry and Banks also engaged in another conversation in October 2015 regarding a wage report flyer that was allegedly sent to Respondent's Human Resources Department. (Tr. 35–37; GC Exh. 11).

2. The alleged unlawful statement by Supervisor Linda Terry in December 2015 and creation of the impression that the employees' union and protected activities were under surveillance.

Banks testified that on or about December 16, 2015, Terry approached her while she was walking in the hallway at work and asked to speak with her. Banks and Terry went into an exam room where they were by themselves. (Tr. 38) According to Banks, Terry told her that "they" had seen "Tasha,"[17] a Medical Assistant who also worked on that third floor ambulatory department, "passing out flyers out in front of the hospital, and that they had her on tape." (Tr. 38) Terry did not identify to Banks who "they" were. (Tr. 39) Banks responded that "she [was] allowed to pass out flyers" and "she was in front of the bus stop at the hospital, not on hospital property." (Tr. 38) According to Banks, Terry responded that Tasha "has a lot of balls to be passing out flyers in front of Children's Hospital. She is – don't you know she is on the verge of being fired, and how stupid is she[?]" (Tr. 38) Terry then told Banks that they "shouldn't be passing flyers out on UPMC's property" and that "I would be careful, you never know who is watching." (Tr. 39)

Banks testified that she understood that Terry was referring to union flyers in that conversation, and that she told Terry she would "let Tasha know." (Tr. 39) Banks further testified that 2 days prior to her conversation with Terry, she saw Tasha passing out union flyers at the bus stop in front of Children's Hospital. (Tr. 40–42)

While Terry acknowledged that in December 2015 she had a conversation with Banks regarding employees passing out flyers at the bus stop outside the facility, her version of that conversation differed significantly from that conveyed by Banks. While Banks testified that Terry approached her in the hallway, Terry testified that it was Banks who approached her and initiated the conversation. (Tr. 163–166, 193) Terry testified that she was standing outside her office on the second floor by the window that looks out onto the bus stop in front of the hospital, and while she was looking out the window Banks approached her and said "Ms. Lin, it wasn't me passing out flyers."[18] (Tr. 163–166, 185) Terry testified that she responded "[I] never said it was" and "I didn't never say it was you passing out flyers." (163–166) Terry testified that Banks then told her, "It was Tasha." (Tr. 166) In response, Terry told Banks that "[i]f anyone is doing anything illegally outside there's cameras outside of the hospital." (Tr. 166)[19]

According to Terry, that was the "entire conversation" with Banks in December 2015, and she claimed that conversation was the only one she had with Banks concerning flyers. (Tr. 169) Furthermore, in Terry's testimony, she admitted on cross-examination that she was aware there was a union organizing campaign at the Respondent's facilities (Tr. 190–191), there were surveillance cameras around Children's Hospital that would record activity at the bus stop (Tr. 182, 195), and that in her conversation with Banks, she mentioned the surveillance cameras and the possibility that something could be illegal. (Tr. 182) However, she never offered an

[17] Tasha's last name was not identified in the record.

[18] This reference to "Lin" was not explained. Presumably, it is an abbreviation for "Linda," which is Terry's first name.

[19] On cross-examination, she also testified that she told Banks, "If someone is doing something outside that's illegal there's cameras outside that we [sic] catch that." (Tr. 195)

explanation as to how or why the passing out of flyers at the bus stop would be illegal. In that connection, she never mentioned on direct examination that the flyers Banks referenced were "union" flyers. In fact, when asked what she understood Banks to mean by her reference to "flyers," she simply answered: "paper." (Tr. 166) She also testified that she was not aware that Banks was involved in any union activities. (Tr. 193)

3. The credibility determinations

As mentioned above, there is conflicting testimony regarding the facts concerning these allegations. Terry denied having the conversation with Banks in October 2015 where she allegedly told Banks that she saw her face on the front of a union paper, and that she should be careful about leaving union flyers around the hospital. In addition, while Terry admitted to having a conversation with Banks regarding employees passing out flyers at the bus stop outside the facility, Terry's version of that conversation differed from that conveyed by Banks.

In instances such as these where the testimony of the General Counsel's witness differs from the testimony of the Respondent's witness, as the finder of fact, I must determine the credibility of the witnesses. Credibility determinations may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction Group*, *Inc.,* 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001)(citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB at 622; *Jerry Ryce Builders*, *Inc.,* 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). Accord: *General Fabrications Corp.*, 328 NLRB 1114 fn. 1 (1999), enfd. 222 F.3d 218 (6th Cir. 2000). See also *J. Shaw Associates*, *LLC*, 349 NLRB 939, 939–940 (2007).

My observation during the trial was that Banks was a very credible witness. She appeared to be honest and sincere in her demeanor. She calmly presented testimony that was consistent, convincing, and plausible. On the other hand, Terry presented testimony that was less convincing. In particular, I found that Terry's demeanor was guarded, defensive, and frequently evasive. Her testimony was also not credible because at times it was inconsistent, contradictory, implausible, and simply not believable. When it came to Terry's testimony regarding her contact and interactions with Banks, she was particularly inconsistent. On one hand, Terry painted a picture of limited contact with Banks. She described her relationship with Banks as "cordial," and she testified that she did not socialize with her or "purposefully engage in conversation" with her on a daily basis (Tr. 163), she only talked to her "once a month" (Tr. 157), and she didn't even know what shift or hours Banks worked. (Tr. 160) On the other hand, she presented testimony indicating her contact with Banks was more than limited. She testified that she had known Banks for 5 years and saw her once a day. (Tr. 157–158) In addition, since Banks was the lead person in that section of the hospital or "pod," Terry testified that she would talk to her "to ask her if she knows what's going on with the issue[s] that's in the pod." (Tr. 159)[20]

[20] According to Terry's testimony, if an employee in the pod contacts her because there is an "issue"

Furthermore, despite testifying that she had "no" other reason to talk to Banks apart from discussing problems in the pod, she admitted that she had informal conversations with Banks, such as when she spoke to her about her "singing" in the pods. (Tr. 163)

Terry's inconsistent testimony was also evidenced by her answers regarding whether she thought it was "odd" that Banks would stop to talk to her about passing out flyers when in fact she was not one of Terry's employees. In that regard, when Terry was asked on cross-examination whether she thought it was odd that Banks stopped to talk to her, she answered "no." (Tr. 193) However, she then contradicted herself when she was asked again: "It wasn't odd to you that she stopped you to talk to you about something; is that correct?" and she answered: "It was odd, yes. To me it was odd." (Tr. 194)

Terry also presented incredible and implausible testimony with regard to her knowledge of Banks' union activities. While Terry testified that she was not aware that Banks was involved in union activities, she admitted that the day prior to her conversation with Banks, Julia Linzie (one of Terry's staff employees at Children's Hospital), called her on the phone and told her that Banks was passing out flyers at the bus stop. (Tr. 167–168, 183, 188) Terry acknowledged that the purpose of the call from Linzie was to inform her of "[a]ctivity going on on the corner." (Tr. 186) Specifically, Terry testified that Linzie stated: "Ms. Lin, there's somebody out here passing out flyers. I think its Pam." (Tr. 168) In response, Terry simply said "Okay." (Tr. 168) Terry testified that Linzie did not identify the type of flyer Banks was allegedly passing out, and Terry admittedly neglected to ask her. (Tr. 168, 187–188)

On this subject, I also found Terry's testimony evasive and less than forthright as she testified in a manner that revealed reluctance to admitting that she knew the flyers being referred to were "union" flyers, and that passing them out constituted union activity. When Terry offered testimony on direct-examination regarding the flyers being passed out at the bus stop, she made no mention that the flyers were "union" flyers. Instead, when asked what kind of flyers she understood Banks was referring to, she was purposefully vague when she answered: "paper." (Tr. 166) Terry, who on cross-examination admitted that she remembered her conversation with Linzie, was asked if the reason she remembered it so well was because she thought it concerned union activity. Her response was simply: "no." (Tr. 191–192) However, Terry then offered the following evasive testimony on cross-examination by the Charging Party's Counsel:

> Q. And you knew that Pam Banks was talking to you the next day about flyers and union activity at the bus stop; correct?
> A. I'm not sure what you're saying…
>
> Q. You had some notion, you said just earlier, that when Pam was talking to you about flyers and the bus stop involved union activity; right? You had some notion about that?
> A. I can't say that I knew anything.

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in the pod, the first person she would look for to find out what happened is the person who contacted her to report the issue, and if that person is not available, the next person she would contact would be the "lead." (Tr. 160)

Q. You thought it; didn't you?
A. I can't say what I thought.

Q. You had some thought when you were talking to Pam Banks that what she was referring to about the day before had something to do with union activity; correct?
A. I can't say what I was thinking at that time, ma'am.

Q. Is it possible that you thought – that you understood it to be about union activity? …Is it possible?
A. Maybe, yes.
(Tr. 196–198)

Besides being evasive, Terry's testimony on this subject was also incredible and implausible. When asked directly on cross-examination if she understood that Banks was reported to have been passing out "Union flyers," Terry answered: "no." (Tr. 186) That testimony is simply not believable or plausible. Despite the fact that Terry allegedly did not know what type of flyers Banks was passing out, and she thought it odd that Linzie was calling her about the flyers, she never asked Linzie what kind of flyers they were or if they were union flyers, she never asked Linzie why she was calling her about the flyers, and, incredibly, she testified that she had no interest in finding out what kind of flyers Banks was passing out. (Tr. 187–188) It is implausible that Terry, when informed that Banks was passing out flyers, would fail to inquire about what type of flyers they were, and in particular, if they were union flyers. I find it equally implausible and unbelievable that she had "no interest" in knowing or finding out what kind of flyers Banks was passing out. In this connection, it is important to note that Terry, as a supervisor at Children's Hospital, was aware that there was a union organizing drive there, she attended management meetings where she was given information about how to handle the union's attempt to organize the employees at the hospital, and she was told on more than one occasion at those meetings that if there was any union activity that she heard or saw, she was to report it to Human Resources. (Tr. 181, 190–191) Those facts make Terry's testimony even more implausible and unbelievable.[21] Finally, if Terry truly believed the flyers were not union flyers, as she alleged, she failed to offer any explanation as to why one of her staff employees would contact her out of the blue to report that Banks was passing out documents at the bus stop. (Tr. 166) She also failed to offer any explanation or rationale as to why passing out just "papers" would be illegal activity that could be recorded on the surveillance cameras.

I also find equally implausible and incredible Terry's assertion that it was Banks who approached her and initiated the conversation about passing out flyers. If in fact Terry's contact

[21] I note that the Respondent argued in its brief that it is simply not believable that Terry made the comments that Banks attributed to her because she is a supervisor with 7 years of experience who admittedly received management training and instruction regarding union issues and organizing campaigns. (R. Br. p. 32) I find no merit to that argument. As mentioned above, I found Terry to be an unreliable witness whose assertions should not be credited. I also note that the mere fact that she received management training which presumably included instructions as to what she should say to employees and what she should not, does not establish that Terry did not make the specific statements attributed to her regarding the employees passing out flyers at the bus stop. See *The Avenue Care and Rehabilitation Center*, 360 NLRB 152, 155.

with Banks (who was not supervised by Terry) was as limited as Terry alleged, and Terry only spoke to Banks once a month as she alleged, it is implausible that Banks would approach Terry unexpectedly to announce that she was not passing out flyers, and that it was Tasha who engaged in that activity. The Respondent offered no credible evidence to explain why Banks would have done such a thing. On the other hand, Banks assertion that Terry approached her to warn her about employees passing out flyers at the bus stop and that such activity should not occur because they did not know who was watching, is credible and plausible. That is especially true considering Terry's admission that Linzie had just told her the day before that Banks was passing out flyers at the bus stop.

In addition, besides finding that Banks was a credible witness who presented honest and reliable testimony, I note that she is also a current employee of the Respondent, and on that basis, I provide her testimony additional weight as she offered testimony adverse to the interests of her current employer. The Board has held that where current employees provide testimony against the interests of their employer, and thus contrary to their own pecuniary interests, such testimony is entitled to additional weight when credited. *The Avenue Care and Rehabilitation Center*, 360 NLRB 152, 152, fn. 2 (2014); *PPG Aerospace Industries, Inc*., 353 NLRB 223 (2008); *Advocate South Suburban Hospital*, 346 NLRB 209, 209 fn. 1 (2006); *Flexsteel Industries, Inc*., 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996).

Thus, where Terry's testimony differs from Banks' testimony, I fully credit Banks and her testimony. Accordingly, I find that in October 2015, Terry approached Banks in the hallway and told her that she saw Banks' face "on the front of a union paper around the hospital," and that Banks "should be careful about leaving [her] union flyers laying around the hospital." (Tr. 32–34, 153) In addition, I find that on or about December 16, 2015, Terry approached Banks in the hallway at work and told her that "they" had seen Tasha "passing out flyers . . . in front of the hospital, and that they had her on tape." Terry also stated that Tasha "has a lot of balls to be passing out flyers in front of Children's Hospital. She is – don't you know she is on the verge of being fired, and how stupid is she[?]" Finally, Terry told Banks that they "shouldn't be passing flyers out on UPMC's property" and that "I would be careful, you never know who is watching."

4. Analysis

a. The Section 8(a)(1) coercive statements

As mentioned above, Section 7 of the Act, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their rights guaranteed in Section 7 of the Act. It is well established that the test for interference, restraint, and coercion does not turn on the employer's motive or on whether the coercion succeeded or failed. Instead, the test is whether the employer engaged in conduct which tends to interfere with the free exercise of employee rights under the Act. *American Tissue Corp*., 336 NLRB 435, 441–442 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.3d 811, 814 (7th Cir. 1946). In making its determination, the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact

on the employees. *American Tissue Corp*., supra at 442 (citing *NLRB v. E. I. du Pont & Co.*, 750 F.2d 525, 528 (6th Cir. 1984)).

The Board has held that threatening employees with reprisals for engaging in union or other protected concerted activities is coercive to the exercise of their Section 7 rights under the Act. *Metro One Loss Prevention Services Group*, 356 NLRB 89, 89 (2010) (employer violates 8(a)(1) if it communicates to employees that it will jeopardize their job security, wages, or other working conditions if they support the union); *Baddour, Inc.*, 303 NLRB 275 (1991) (an employers' threats of discipline or job loss for participation in protected concerted activities constitute violations of the Act). The Board has applied this theory to explicit or implicit threats to employees, including the loss of their jobs or other adverse work consequences. *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1091–1096 (2004) (employer violated Section 8(a)(1) of the Act by threatening loss of benefits, loss of jobs, and closure of the facility if the employees supported the union.); *Sheraton Hotel Waterbury*, 312 NLRB 304, 305 (1993) (implied threat contained in employer's posting violated Section 8(a)(1) of the Act); *Metro One Loss Prevention Services Group*, supra at 89–90 (employer implied working conditions could deteriorate if the employees supported the union organizing drive in violation of Section 8(a)(1) of the Act).

In this case, Terry's statement in October 2015 that Banks should "be careful" about leaving her union flyers around the facility, inferred that she had been identified as someone engaging in protected activity, and that such conduct was prohibited and could lead to unspecified reprisals, such as discipline or discharge. I find that Terry's statement would certainly tend to interfere with Banks' free exercise of protected rights in violation of Section 8(a)(1) of the Act.

I note that with regard to this allegation, the Respondent argues that no violation should be found because Terry's statement was meant to be a "cautionary statement regarding leaving materials out in hospital spaces." (R. Br. p. 35). That argument, however, is without merit. The Board has held that "the supervisor's motive or intent in making the statement has no relevancy in an 8(a)(1) context." *Exterior Systems, Inc*., 338 NLRB 677, 679 (2002); *GM Electrics*, 323 NLRB 125, 127 (1997). The Board has also found statements by managers that are intimidating or coercive, despite the fact that they may have been meant to be helpful or cautionary, nevertheless infringe on employees' Section 7 rights and violate the Act. See *Harmony Corp.*, 301 NLRB 578, 585–586 (1991) (where supervisors told two employees to "be careful" because the employer was trying to find safety violations that could be used against them because of their union activities, while the warnings were "designed to be helpful," they were also intimidating and constituted violations of Section 8(a)(1) of the Act.)

In addition, Terry's statement in December 2015 that Banks and the other employees "shouldn't be passing out flyers on UPMC's property," while also recounting that the employee she had seen passing out flyers was "on the verge of being fired," also conveyed that such conduct could lead to retaliatory action by the Respondent, such as discipline or discharge. I find that these comments by Terry would also reasonably cause an employee to believe they would then be subject to unspecified reprisals for engaging in the protected conduct of passing out union flyers, which would certainly tend to interfere with the free exercise of Section 7 protected

rights. Accordingly, I find that Respondent UPMC Children's Hospital violated Section 8(a)(1) of the Act.

b. The Section 8(a)(1) creation of the impression of surveillance

I also find that Terry's statements to Banks that Tasha was seen "passing out flyers . . . in front of the hospital, and that they had her on tape," created the impression that employees' union and protected activities were under surveillance by the Respondent. That finding is further evidenced by Terry's statement that the employees "shouldn't be passing flyers out on UPMC's property" and that "you never know who is watching."

In determining whether a statement or question created an unlawful impression of surveillance, the Board considers "whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance." *Camaco Lorain Manufacturing Plant*, 356 NLRB 1182, 1183 (2011); *Frontier Telephone of Rochester, Inc*., 344 NLRB 1270, 1276 (2005), enfd. mem. 181 Fed. Appx. 85 (2d Cir. 2006) (citing *Flexsteel Industries*, *Inc.,* 311 NLRB 257 (1993)). The Board has held that "[t]he idea behind finding 'an impression of surveillance' as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999) (citing *Flexsteel Industries*, supra at 257).

In this case, I find that the flyers being handed out were union flyers and that Terry's assertions that such activity did not constitute union activity or that she was not aware that it constituted union activity, are not credible, plausible, or supported by the record. I find that Terry's statement to Banks that Respondent had Tasha "on tape" outside passing out union flyers, and her statement that, "I would be careful, you never know who is watching" would cause reasonable employees to assume that their protected activities had been placed under surveillance by the Respondent. In addition, the Board has held that employer comments to employees that specifically name other employees as having been involved in union activity, such as being a union leader or the person that started the union movement, "unlawfully creates the impression, in the minds of its employees, that [it] has been engaged in surveillance of [the] employees' union activities." *Royal Manor Convalescent Hospital*, *Inc.,* 322 NLRB 354, 362 (1996), enfd. 141 F.3d 1178 (9th Cir. 1998). Furthermore, I find that Terry's admission that she told Banks "[i]f anyone is doing anything illegally outside there's cameras outside of the hospital," left little, if any doubt, that the employees' protected activities were considered illegal by the Respondent and that they were under surveillance. Accordingly, I find that Respondent Children's Hospital violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondents UPMC Mercy Hospital, UPMC Children's Hospital, and UPMC Presbyterian Shadyside Hospital are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The SEIU Healthcare Pennsylvania, CTW, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents UPMC Mercy Hospital, UPMC Children's Hospital, and UPMC Presbyterian Shadyside Hospital have engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by: maintaining and enforcing an unlawful and overly broad Solicitation and Distribution Policy that prohibits employees from soliciting or being solicited in non-work areas while off duty; and orally announcing, promulgating, maintaining, and enforcing an overly broad and unlawful Distribution Policy prohibiting employees from distributing non-work materials in non-work areas.

4. Respondent UPMC Children's Hospital has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by: in October 2015, threatening employees with unspecified reprisals for engaging union and protected activities; and in December 2015, threatening employees with retaliation and unspecified reprisals for engaging union and protected activities, and creating the impression that employees' union activities were under surveillance.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents UPMC Mercy Hospital, UPMC Children's Hospital, and UPMC Presbyterian Shadyside Hospital have engaged in certain unfair labor practices, I shall order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As I have deferred the single employer issues, I will order Respondent UPMC Mercy Hospital, Respondent UPMC Children's Hospital, and Respondent UPMC Presbyterian Shadyside Hospital to each post separate notices to employees.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[22]

ORDER

Respondent UPMC Mercy Hospital, Respondent UPMC Children's Hospital, and Respondent UPMC Presbyterian Shadyside Hospital, their officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Maintaining and enforcing a Solicitation and Distribution Policy or any rule which prohibits employees from engaging in solicitation or being solicited in non-work areas while the employees and/or their fellow employees are off duty;

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Promulgating, maintaining, and enforcing a Distribution Policy or any rule which prohibits employees from distributing or leaving non-work materials in non-work areas; and

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

In addition, Respondent UPMC Children's Hospital, its officers, agents, successors, and assigns, shall cease and desist from threatening employees with retaliation or unspecified reprisals because of their union membership, activities, and support; and creating the impression among employees that their union activities are under surveillance by telling employees that they are being watched or that their union activities are being videotaped.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days of the Board's Order, revise or rescind the portion of the Solicitation and Distribution Policy that prohibits employees from engaging in solicitation or being solicited while the employees and/or their fellow employees are off duty.

(b) Within 14 days of the Board's Order, rescind their Distribution Policy which prohibits employees from distributing or leaving non-work materials in non-work areas.

(c) Furnish all current employees with inserts for the Solicitation and Distribution Policy that (1) advise that the unlawful policies have been rescinded, or (2) provide the language of a lawful policy; or publish and distribute a revised Solicitation and Distribution Policy that (1) does not contain the unlawful portion of the policy, or (2) provides that language of a lawful policy.

(d) Within 14 days after service by the Region, post at their respective facilities in Pittsburgh, Pennsylvania, copies of their respective attached notices marked "Appendix A," "Appendix B," and "Appendix C."[23] Copies of the notices, on forms provided by the Regional Director for Region 6, after being signed by the Respondents authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet (the Infonet) or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since September 15, 2015.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. January 18, 2018

Thomas M. Randazzo
Administrative Law Judge

APPENDIX "A"

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the portion of our Solicitation and Distribution Policy or any other rule which prohibits you from engaging in solicitation or being solicited when you and/or your fellow employees are on non-working time or off duty.

WE WILL NOT promulgate, maintain or enforce a Distribution Policy or any other rule which prohibits you from distributing or leaving non-work materials in non-work areas.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act, which are listed above.

WE WILL, within 14 days from the date of the Board's Order, revise or rescind the portion of the Solicitation and Distribution Policy that prohibits employees from engaging in solicitation or being solicited when the employees and/or their fellow employees are on non-working time or off duty.

WE WILL, within 14 days of the Board's Order, rescind our Distribution Policy which prohibits employees from distributing or leaving non-work materials in non-work areas.

WE WILL furnish all current employees with inserts for the Solicitation and Distribution Policy that (1) advise that the unlawful policies have been rescinded, or (2) provide the language of a lawful policy; or publish and distribute a revised Solicitation and Distribution Policy that (1) does not contain the unlawful portion of the policy, or (2) provides that language of a lawful policy.

UPMC PRESBYTERIAN SHADYSIDE HOSPITAL
(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222-4111
(412) 395-4400
Hours: 8:30 a.m. to 5:00 p.m. ET

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/06-CA-171117 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (412) 690-7117.

APPENDIX "B"

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the portion of our Solicitation and Distribution Policy or any other rule which prohibits you from engaging in solicitation or being solicited when you and/or your fellow employees are on non-working time or off duty.

WE WILL NOT promulgate, maintain or enforce a Distribution Policy or any other rule which prohibits you from distributing or leaving non-work materials in non-work areas.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act, which are listed above.

WE WILL, within 14 days from the date of the Board's Order, revise or rescind the portion of the Solicitation and Distribution Policy that prohibits employees from engaging in solicitation or being solicited when the employees and/or their fellow employees are on non-working time or off duty.

WE WILL, within 14 days of the Board's Order, rescind our Distribution Policy which prohibits employees from distributing or leaving non-work materials in non-work areas.

WE WILL furnish all current employees with inserts for the Solicitation and Distribution Policy that (1) advise that the unlawful policies have been rescinded, or (2) provide the language of a lawful policy; or publish and distribute a revised Solicitation and Distribution Policy that (1) does not contain the unlawful portion of the policy, or (2) provides that language of a lawful policy.

UPMC MERCY HOSPITAL
(Employer)

Dated: _____ By: _____
(Representative) (Title)

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APPENDIX "C"

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the portion of our Solicitation and Distribution Policy or any other rule which prohibits you from engaging in solicitation or being solicited when you and/or your fellow employees are on non-working time or off duty.

WE WILL NOT promulgate, maintain or enforce a Distribution Policy or any other rule which prohibits you from distributing or leaving non-work materials in non-work areas.

WE WILL NOT threaten you with retaliation or unspecified reprisals because of your union membership, activities, and support.

WE WILL NOT create the impression that your union activities are under surveillance by telling you that you are being watched or that your union activities are being videotaped.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act, which are listed above.

WE WILL, within 14 days from the date of the Board's Order, revise or rescind the portion of the Solicitation and Distribution Policy that prohibits employees from engaging in solicitation or being solicited when the employees and/or their fellow employees are on non-working time or off duty.

WE WILL, within 14 days of the Board's Order, rescind our Distribution Policy which prohibits employees from distributing or leaving non-work materials in non-work areas.

WE WILL furnish all current employees with inserts for the Solicitation and Distribution Policy that (1) advise that the unlawful policies have been rescinded, or (2) provide the language of a lawful policy; or publish and distribute a revised Solicitation and Distribution Policy that (1) does not contain the unlawful portion of the policy, or (2) provides that language of a lawful policy.

UPMC CHILDREN'S HOSPITAL
(Employer)

Dated: _____ By: _____
(Representative) (Title)

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